No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS,

v.

STATE OF HAWAII, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* PARS EQUALITY CENTER, IRANIAN AMERICAN BAR ASSOCIATION, AND PUBLIC AFFAIRS ALLIANCE OF IRANIAN AMERICANS, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Identity of *Amici Curiae*

Pars Equality Center (Pars) is a nonprofit organization dedicated to helping all members of the Iranian-American community to realize their full potential as informed, self-reliant, and responsible members of American society. Pars believes that learning and teaching the rights and responsibilities of citizenship in a democracy, as well as the rules and rewards of entrepreneurship, are necessary ingredients for success, and the organization achieves its mission primarily by providing extensive social and legal services. Pars advocates for families and individuals in need, with a strong focus on refugees, asylees, and low-income immigrants.

The Iranian American Bar Association (IABA) is an independent, apolitical 501(c)(6) nonprofit professional association of attorneys, judges, and law students. It seeks to educate the Iranian-American community in the United States about legal issues of interest, advance the legal rights of the community, and ensure that government officials and the public at large are fully and accurately informed on legal matters of concern to the Iranian-American community. IABA also seeks to foster and promote the achievements of Iranian-American lawyers and other legal professionals. IABA has over 1500 members, and has chapters in the District of Columbia, Dallas,

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amici curiae*, their members, or *amici*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief, and copies of the letters of consent are on file with the Clerk's Office.

Los Angeles, New York, Northern California, Orange County, Phoenix, and San Diego.

Public Affairs Alliance of Iranian Americans, Inc. (PAAIA) is a nonprofit, nonpartisan organization based in Washington, D.C., that includes 501(c)(3) and (c)(4) components. PAAIA, Inc. is a 501(c)(4) bipartisan, non-sectarian, national membership organization with an affiliated 501(c)(3) organization, IA-100, Inc. PAAIA serves the interests of Iranian Americans and represents the Iranian-American community before U.S. policymakers and the American public at large. PAAIA works to foster greater understanding between the people of Iran and the United States, expand opportunities for the active participation of Iranian Americans in the democratic process at all levels of government and in the public debate, and provide opportunities for advancement for the next generation of Iranian Americans.

Interest of *Amici Curiae*

The discrimination and animus underlying the travel ban and the Trump Administration's policy of discriminatory exclusion has continued to demean and stigmatize minority communities, in particular, the Iranian-American community. Of the seven countries specified in the January 27, 2017 Executive Order, Iran had the largest total number of entrants (310,182) between 2006 and 2015. And of the estimated 90,000 visas issued in 2015 to nationals of those seven countries, nearly half were to citizens of Iran. Iranians also represent a substantial proportion of the political and religious refugees who are resettled in the United States each year.

Amici curiae are three prominent Iranian-American organizations in the United States. The United States has a long history of welcoming Irani-

ans who, like so many others from around the world, hope to share in the promise and opportunity that this nation embodies. Many, as political dissidents or members of religious communities, seek shelter in the United States. Many others come here on student, work, and other visas, or as permanent residents through ordinary channels. For decades, this country has made a commitment to Iranian immigrants and their families to allow them to live free from fear and political repression and allow them to contribute to American society. These immigrants and visitors have flourished on American soil and contributed to our society in various professions and callings, including in medicine, mathematics, diplomacy, business, science, education, and the arts. They exemplify the vitality of this nation of immigrants.

The travel ban has shaken the Iranian-American community to its very core. Countless families have been traumatically split by forced separation. Life plans have been disrupted. Many individuals have abandoned educational and professional plans. Immediately upon the signing of the January 27 Executive Order, and continuing over the last fourteen months, *amici* have devoted thousands of hours and a significant proportion of their resources to respond to the effects of the travel ban on the Iranian-American community.

Amici therefore have a real and pressing interest in the outcome of this case. *Amici* agree with respondents that they have shown a likelihood of success on their claims that Proclamation 9645 violates the Establishment Clause and the nondiscrimination provisions of the Immigration and Nationality Act. Indeed, on February 8, 2017, *amici*—together with 19 individual plaintiffs—filed suit in the U.S. District Court for the District of Columbia, asserting consti-

tutional and statutory challenges to the travel ban and seeking a preliminary injunction against the ban's enforcement. *See* Complaint, *Pars Equality Center v. Trump*, No. 17 Civ. 255 (D.D.C. Feb. 8, 2017). *Amici* subsequently amended their complaint and sought preliminary relief against the March 6, 2017 order, and again against Proclamation 9645.

Like the cases currently before this Court, *amici*'s complaint raises claims under the Establishment Clause, but also alleges violations of the Equal Protection Clause (discrimination on the basis of national origin and religion), the Due Process Clause, and the Administrative Procedure Act. *Amici* specifically have sought a permanent injunction against the Section 3(c) "waiver" provisions of the March 6 order and Proclamation 9645. The case proceeded to an evidentiary hearing, focusing on standing and irreparable harm, and the district court held two arguments on *amici*'s request for injunctive relief. On March 2, 2018, the district court stayed the *Pars Equality Center* case pending resolution of the proceedings before this Court. This Court's decision in this case will likely affect the course of *amici*'s case.

Accordingly, *amici* urge this Court to affirm the injunctions against the enforcement of the travel ban.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ordinary process for obtaining a visa to enter the United States is systematic and orderly, possessing the hallmarks of a fair and administrable government program. Applicants fill out application forms following published guidance. Applications are reviewed by consular officers applying clear—if sometimes stringent—eligibility standards. Denials are memorialized in writing, supported by reasons, and subject to reconsideration or supervisory review.

Presidential Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017), deprives nationals of six Muslim majority countries, plus North Korea, and certain Venezuelan officials, of access to this established process. For these individuals, the Proclamation bans virtually all entry to the United States, and relegates those who nevertheless wish to enter the United States to requesting "waivers" on a "case-by-case" basis under Section 3(c) of the Proclamation. As the government has acknowledged—and as the individual stories presented below illustrate—there is no specific procedure for seeking a waiver, much less any published guidance or constraints on consular officers' discretion. In short, for nationals of the affected countries, the Proclamation holds out the possibility of a waiver, subject to opaque, ad hoc, and entirely discretionary decisionmaking.

Since this Court's December 4, 2017 order staying the district court's injunction—and permitting petitioners to implement Proclamation 9645—the grant of waivers under Section 3(c) has been all but illusory. Out of the 8,406 visa applications consular officers received and processed from individuals subject to the Proclamation, only *two* waivers had been

approved as of February 15, 2018. In other words, Proclamation 9645 has functioned as a "travel ban," barring thousands of individuals who would otherwise have qualified for visas—and many with bona fide relationships to the United States—from entering this country.

Far from mitigating the harsh effects of the ban on entry, petitioners' implementation of the waiver "system" confirms that Proclamation 9645 is motivated by the same improper animus that underlies petitioners' nativist and discriminatory immigration policies. Independent of petitioners' violations of the anti-discrimination provisions of the Immigration and Nationality Act of 1965 (INA), 79 Stat. 911, and the Establishment Clause, petitioners' implementation of Proclamation 9645 also raises grave constitutional concerns under the Equal Protection Clause and the Due Process Clause. Should the injunctions be vacated, *amici* will seek further injunctive relief based on these violations.

ARGUMENT

I. Case-by-Case Waivers Are a Separate and Inherently Unequal Alternative to the Visa Process

The ordinary visa process follows clear and established procedures to ensure the fair application of the immigration laws to people who wish to apply to enter the United States. Not so for Proclamation 9645's purported "case-by-case" waivers. Although waiver decisions are purportedly entirely discretionary, virtually every waiver application submitted by individuals from the countries targeted by President Trump's ban has been denied, based on nothing but the exercise of unreviewable consular fiat.

A. Visa Adjudications Follow Established Procedures and Guidelines that Afford Applicants Process

The visa process is governed by a matrix of statutes, regulations, and State Department policies that establish an orderly system for applying for and obtaining a visa to enter the United States. *See generally* 8 U.S.C. §§ 1182, 1201, 1202; 22 C.F.R. § 40 *et seq.*; 9 FAM. Ordinarily, a foreign resident seeking to visit the United States must obtain a visa.

There are two main categories of visas: nonimmigrant visas for foreign residents seeking to visit the United States for a particular temporary purpose, and immigrant visas for those seeking permanent residence in the United States. *See* 9 FAM 102.3-14; 401.1-2; 504.10-2(A). An applicant for either type of visa is eligible for a visa if he or she (1) falls within one of the categories set forth by statute, *see* 8 U.S.C. § 1101(a)(15) (nonimmigrant aliens); *id.* §§ 1151, 1153 (immigrant aliens); (2) complies with the procedural requirements and submits the necessary documents, *see* 8 U.S.C. § 1202; and (3) is not otherwise ineligible for a visa, *see* 9 FAM 301.4 (summarizing ineligibilities and grounds for refusal).

A reviewing consular officer may refuse to issue a visa "only upon a ground specifically set out in the law or implementing regulations." 22 C.F.R. § 40.6; *see* 9 FAM 301.1(3) ("The visa adjudicator is required to make a determination based upon facts or circumstances that would lead a reasonable person to conclude that the applicant is ineligible to receive a visas provided in the INA and as implemented by the regulations."). Consular officers must carefully review the statutes, regulations, and FAM provisions when adjudicating visa applications. *See* 9 FAM

301.1(4). And the visa officer "must provide the applicant and any attorney of record a written refusal" that, among other requirements, "explicitly state[s] the provision of the law under which the visa is refused." 8 U.S.C. § 1182(b); 9 FAM 403.10-3(A)(2).

In addition, visa denials are subject to supervisory review, "to ensure compliance with laws and procedures." 22 C.F.R. § 41.121(c). Consular managers must review "as many nonimmigrant visa ... refusals as is practical, but not fewer than 20% of refusals." 9 FAM 403.10-3(D)(2).

The INA and its implementing regulations and agency policies also provide for waivers of statutory grounds for inadmissibility. *See* 8 U.S.C. § 1182(d)(3)(A) (temporary admission of inadmissible aliens); *see generally id.* § 1182 (providing for waivers of certain grounds of inadmissibility). An applicant seeking a waiver of inadmissibility "must apply for the waiver by filing the correct application." USCIS Policy Manual vol. 9, pt. A, ch. 2.

If an applicant meets the requirements for a waiver of inadmissibility (which are defined by statute and regulation), the reviewing officer must decide whether to exercise his or her discretion to grant a waiver. *Id.* ch. 5. The USCIS policy manual sets forth a non-exhaustive list of factors relevant to the discretionary analysis. *Id.* If the reviewing officer denies a waiver of inadmissibility, he or she must specify the reasons for the denial. 8 C.F.R. § 103.3(a)(1)(i). An officer denying a waiver in the exercise of his or her discretion "should explain how the negative factors outweigh the positive factors." USCIS Policy Manual vol. 9, pt. A, ch. 7. The decision letter must also inform the applicant if the decision is appealable or if

the applicant may move to reopen or for reconsideration of the decision. *Id.*

B. Case-by-Case Waiver Decisions Under the Proclamation Lack Procedural Safeguards

The prospect of "case-by-case" waivers under Section 3(c) of the Proclamation has none of the features of the ordinary visa-adjudication process that guide the exercise of the reviewing consular officer's discretion and advise applicants of the standards and procedures.

In contrast to the detailed statutory and regulatory regime governing visas, the government has provided no guidelines or information about how to apply for a Section 3(c) waiver, nor about the criteria used to determine whether an individual is eligible for a waiver—beyond the vague and generic language in the Proclamation, namely, that an applicant must demonstrate that the denial of the waiver would pose an "undue hardship," and that the grant of a waiver would not "pose a threat to the national security or public safety of the United States," and would be in the "national interest." Although Proclamation 9645 directed the Secretaries of State and Homeland Security to issue "guidance" establishing the "standards, policies, and procedures" for waivers, § 3(c)(ii), six months after the Proclamation was published in the Federal Register, the State Department and the Department of Homeland Security have yet to offer any substantive guidance to nationals of the designated countries seeking to enter the United States.

Similarly, in contrast to the ample information provided to applicants about the visa process, petitioners have released no meaningful information to applicants on the standards or procedures for re-

questing a Section 3(c) waiver. This is clear from the single State Department publication regarding the waiver program—the December 4, 2017 State Department "frequently asked questions."

For example, in response to the question "How do I qualify for a waiver to be issued a visa?" the website simply repeats the vague language from the Proclamation, advises that "[t]here is no separate application for a waiver," and instructs "[a]n individual who seeks to travel to the United States [to] apply for a visa and disclose during the visa interview any information that might demonstrate that he or she is eligible for a waiver." Beyond parroting the Proclamation's vague pronouncements about the "national interest," "national security or public safety" concerns, and "undue hardship," the website provides no guidance about what kind of "information" the applicant should disclose. Dep't of State, *New Court Orders on Presidential Proclamation*, https://goo.gl/DV6hp7. The website further states that "[a] consular officer will carefully review each case to determine whether the applicant is affected by the Proclamation, and if so, whether the case qualifies for an exception or a waiver." *Id.* But nothing on the website, or in agency regulations or published guidance, sets forth any further guidelines about the process either for applicants seeking entry or to guide the consular officer's exercise of discretion.

Moreover, in contrast to the visa program, there is no requirement that applicants who are denied Section 3(c) waivers (often without ever being advised of the possibility of a waiver) be advised of the reason for the denial. And unlike the visa program, there are no supervisory reviews or procedures to seek reconsideration.

II. The Possibility of Case-by-Case Waivers Does Not Prevent Undue Hardship or Irreparable Injury

The inequities between the ordinary visa system and purported case-by-case waivers under the Proclamation are not merely theoretical. In actual practice—and in stark contrast to the visa-approval rate—Section 3(c) waivers under the Proclamation are vanishingly rare.

In 2016, for example, the United States issued more than 73,500 immigrant and nonimmigrant visas to nationals of the eight listed countries, or more than 6,125 per month.[2] In contrast, according to the State Department, in the first month after the latest Proclamation took effect on December 8, 2017, of the 8,406 visa applications consular officers received and processed from individuals subject to the ban, 6,553 were denied because of the Proclamation.[3] Only *two* waivers had been approved as of February 15—a rate of less than 0.025%.[4] The State Department's report-

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[2] *See* Dep't of State, *Report of the Visa Office 2017*, tbls.XIV, XVIII, https://goo.gl/d7E5PB.

[3] The State Department further reported that the remaining applicants either qualified for an exception (128 applicants), or were refused for reasons unrelated to the Proclamation (1,723). Letter from Mary K. Waters, Ass't Sec. for Legis. Affairs, Dep't of State, to Sen. Chris Van Hollen (Feb. 22, 2018), http://goo.gl/FVTchj.

[4] Yeganeh Torbati & Mica Rosenberg, *Exclusive: Visa waivers rarely granted under Trump's latest U.S. travel ban: data*, Reuters (Mar. 6, 2018), https://goo.gl/4w3F3W. The State Department has subsequently claimed that it has issued additional waivers (more than 375 as of March 27, 2018), but this number is far higher than the figure they previously disclosed in response to congressional inquiries (2 as of February 15, 2018). In any event, this number still falls far short of the previous vi-

ing is consistent with *amici*'s experience. *Amici* have counseled or are otherwise aware of just under 1,000 individuals who have sought entry to the United States but have been denied entry under the Proclamation. *Amici* are aware of only two instances where waivers were granted.

The prospects for being granted a waiver were minuscule even among applicants who were found to meet the Proclamation's stringent three-part criteria for waiver consideration. Two hundred seventy-one of the 273 applicants who apparently demonstrated to a government official's satisfaction that (1) the denial of their entry would cause them undue hardship, (2) their entry would not pose a threat to the national security or public safety of the United States, and (3) their entry would be in the national interest, were nonetheless refused a waiver.[5]

The rejection rate of more than 99.9% of applicants—even after they have demonstrated their eligibility and suitability for admission under the visa system and the additional criteria established in the Proclamation—highlights the ongoing hardship that Proclamation 9645 inflicts on countless individuals subject to the travel ban, including many U.S. citizens and individuals with bona fide relationships to the United States. *Amici* have spent countless hours counseling individuals on waivers. The following stories are just a small cross-section of the ongoing human costs of the government's blanket exclusionary policies.

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sa-approval rate. Mica Rosenberg, *Trump's travel ban imperils U.S. citizen with cancer* (Mar. 27, 2018), https://goo.gl/Mj8TZc.

[5] Letter from Mary K. Waters, Ass't Sec. for Legis. Affairs, Dep't of State, to Sen. Chris Van Hollen (Feb. 22, 2018), goo.gl/FVTchj.

Jane Doe #1.[6] Jane Doe #1, a dual citizen of the United States and Iran, has lived in the United States since age 11. She has a master's degree in city planning and works for the County of San Diego. In 2013, she met her fiancé, who is Iranian, while he was visiting the United States on a tourist visa. Over the following two years, Jane Doe #1 traveled to Iran to visit him several times. In October 2015, they were engaged. The couple hired a lawyer to guide them through the visa process so that they could be married in the United States. In February 2016, Jane Doe #1's fiancé submitted his K-1 visa petition. Not long thereafter, Jane Doe #1's fiancé suffered serious injuries in an automobile accident and lost his right leg at the knee. Nevertheless, the couple was able to travel to Abu Dhabi in October 2016 for the visa interview and received verbal approval of the visa. The couple was advised that "additional administrative processing" could take up to six months.

Jane Doe #1 and her fiancé began planning their wedding ceremony and dreamed of their future together in the United States. But three months after their visa interview—and before the visa issued—President Trump signed the January 27 Executive Order. It has now been almost a year and a half since the couple's visa interview. Still, Jane Doe #1's fiancé has not received his visa. Meanwhile, the government has ignored the couple's repeated inquiries about the visa's status.

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[6] The pseudonyms of anonymous declarants are based on a continuation of the numbering system used in *Pars Equality Center v. Trump*, No. 17 Civ. 255 (D.D.C. Feb. 8, 2017). The anonymous declarants are: Jane Doe #1, Jane Does ##16-23, and John Doe #10.

In the wake of Proclamation 9645, Jane Doe #1 worked with an immigration attorney to prepare a waiver request that was over 150-pages long, explaining that her fiancé will suffer undue hardship if his visa is denied. Since his injury, Jane Doe #1's fiancé has been unemployed and forced to live with his mother because Iran lacks any systematic accommodations for disabled persons. Jane Doe #1 submitted the waiver request on December 20, 2017 and has not heard any update on the request since then. As a result, the couple has been separated and forced to postpone their marriage indefinitely.

Nageeb Alomari. Nageeb Alomari is a citizen of the United States and a father of three. His wife and children currently live in Yemen. His wife and two older daughters (age 8 and 10) are Yemeni citizens, and his youngest daughter (age 5) is a citizen of the United States. Mr. Alomari's eldest daughter, S., was born with cerebral palsy, which makes moving, speaking, and everyday tasks difficult for her. At one point, her conditions were manageable with the help of medication. However, the intensification of the war in Yemen and the onset of a deadly siege has since prevented S. from receiving her medication. She can no longer move or speak.

S.'s doctors told her parents that she will not survive in Yemen. Mr. Alomari initiated the visa application process with the hope of bringing his daughter to the United States for life-saving medical care. Mr. Alomari gathered the necessary documentation, flew from California to Djibouti, and waited for an interview for more than six months, all at great personal expense. Yet the application was summarily denied, without the opportunity for an appeal. His family was not granted hardship waivers, despite his daughter's devastating condition.

Maral Tabrizi. Maral Tabrizi was born in Iran and came to the United States as a student in 2006. In 2015, she married a United States citizen and became a permanent resident of the United States. She is a contract researcher at Google and recently gave birth to her first child.

In 2017, Ms. Tabrizi and her husband invited her parents to visit from Iran to assist the couple during Ms. Tabrizi's pregnancy and after the child's birth. Ms. Tabrizi suffers from a connective-tissue disorder and tailbone and back injuries, which presented challenges during her pregnancy and now while she cares for her baby. Because Ms. Tabrizi is an independent contractor, she is ineligible for paid maternity leave or Family and Medical Leave Act benefits.

Ms. Tabrizi's parents interviewed for visas in October 2017. Ms. Tabrizi's mother's visa was approved in October; her father was told a decision on his application might take 30 to 90 days. Ms. Tabrizi's mother delayed picking up her visa with the expectation that she and her husband could pick up their visas together. In December 2017, Ms. Tabrizi's mother received a letter from the U.S. Consulate informing her that a consular officer had now decided she was ineligible for a visa because of Proclamation 9645 and that she did not qualify for a waiver. No further explanation was given. Ms. Tabrizi's father received a similar letter in February 2018. He was offered no opportunity to show eligibility for a waiver. Ms. Tabrizi wrote to the White House explaining the difficulties the Proclamation created for her family. Four weeks later, she received a response from the USCIS Contact Center that provided general information regarding the visa- and waiver-application processes, but no specific information about her situation.

Jane Doe #19. Jane Doe #19 is a citizen of Iran currently enrolled in a civil engineering PhD program studying the monitoring and regulation of bridges. She is in the United States on an F-1 student visa. She met her husband, an Iranian citizen also enrolled in a civil engineering PhD program, in the United States. Because they have single-entry visas, Jane Doe #19 and her husband cannot leave the United States without having to reapply for visas. For that reason, she and her husband held a religious marriage ceremony in the United States, but decided to wait to hold a civil ceremony until their families could visit them.

Jane Doe #19 applied for a visa on behalf of her father, who was interviewed at the U.S. Embassy in Armenia in April 2017. The interview went well and the consular officer did not raise any concerns or mention a waiver. Her husband applied for visas on behalf of his mother, father, sister, and niece, who were also interviewed at the U.S. Embassy in Armenia in April 2017. They were informed that the United States would issue visas to his mother and niece immediately, but they decided to wait to travel until all visas were approved. More than six months later, having had to cancel their flights to the United States, the visa applications were all rejected. Jane Doe #19 received an email indicating that her father was not eligible for a waiver, despite the fact that he was never asked to apply for one.

John Doe #10. John Doe #10 is a U.S. citizen and an assistant professor at a U.S. public university. His wife, also an assistant professor at a U.S. public university, is an Iranian citizen and a lawful permanent resident of the United States. Their infant daughter is a U.S. citizen. John Doe #10's wife's applications for the removal of conditions from her green card and

for U.S. citizenship are pending. Because John Doe #10 refused to convert to Islam, the Government of Iran does not recognize their marriage and considers their daughter to be illegitimate, which prevents them from visiting his wife's parents in Iran. His wife's conversion to Christianity also makes it dangerous for her to visit Iran.

John Doe #10's parents-in-law are law-abiding citizens of Iran in good standing and were granted visas to attend their daughter's wedding ceremony in 2015. Mr. Doe hoped that his parents-in-law could return to the United States for the birth of his daughter (their only grandchild) and to help care for his wife and newborn child. Their visa appointment, originally scheduled for late April 2017, was cancelled following the entry into effect of the January 27 Executive Order, and later rescheduled as a result of the subsequent injunction. The visas were approved pending administrative processing, but were not issued.

In the meantime, John Doe #10's daughter was born in June 2017. John Doe #10 and his wife have sought to secure his parents-in-laws' visas, including by sending detailed evidence of the bona fide relationship between her parents and themselves, and later by requesting a waiver. This correspondence and evidence was consistently met with automatic email replies from the Consulate, and the waiver request was ultimately summarily dismissed. Ultimately, Mr. Doe and his family had to travel to Norway so that his in-laws could meet their granddaughter.

Jane Doe #21. Jane Doe #21 is a United States citizen residing in Washington. She holds a doctorate in computer science and has been a visiting re-

searcher and post-doctoral fellow at a major U.S. research university. She works as a senior research scientist at a well-known global technology company and, for the past two years, has been a U.S. military reservist, where she serves as a petty officer. Jane Doe #21 was born in Iran. Her parents are Iranian citizens and currently reside in Iran.

In April 2017, Jane Doe #21 learned her mother required significant spinal surgery. As a member of the U.S. armed forces, Jane Doe #21 worried that she would be arrested by Iranian authorities if she returned to Iran. Jane Doe #21 therefore instead made plans to bring her parents to the United States, so that her mother could receive better medical treatment and Jane Doe #21's support during her potentially difficult recovery.

In May 2017, Jane Doe #21's parents applied for permanent residency in the United States. After waiting almost a year, her parents have yet to be granted interviews. Jane Doe #21 has been advised that, even if her parents receive interviews, the government is unlikely to approve visas for Iranian citizens because of Proclamation 9645. The government's refusal to grant her parents interviews has caused Jane Doe #21 enormous anxiety. She desperately wants to care for her mother but worries she will only be able to do so in Iran, requiring her to resign from her position as a member of the U.S. military reserves.

Jane Doe #20. Jane Doe #20 is a citizen of Iran, residing in Massachusetts under a J-1 visa. She is a post-doctoral fellow at a major U.S. research university, where she conducts neuroscientific research. Jane Doe #20 was born and raised in Iran, where most of her family currently resides. In 2016, she ap-

plied for a non-immigrant visitor visa for her seventy-two year old, recently widowed mother to travel from Iran and visit her in the United States.

Her mother's application remained in "administrative processing" for over a year. After waiting 15 months, Jane Doe #20 received a letter from the U.S. Embassy in Brussels in early 2018, informing her that a consular officer had found her mother ineligible for a visa under "Section 212(f) of the Immigration and Nationality Act, pursuant to Presidential Proclamation 9645." The letter also told her that her mother had been found ineligible for a hardship waiver, "[t]aking into account the provisions of the Proclamation." Jane Doe #20's mother promptly asked the Embassy to further review her waiver eligibility. The Embassy agreed and, on several occasions, requested additional information from her.

Because of these requests, Jane Doe #20 was hopeful the Embassy would reverse its earlier decision and grant her mother a waiver. However, shortly thereafter, she and her mother received a letter from the Embassy denying her mother's waiver and directing them to a U.S. State Department webpage summarizing Presidential Proclamation 9645. Jane Doe #20 desperately wants to see her mother. But because her entry visa has expired, traveling to Iran would require that she reapply for a visa in order to reenter the United States. Jane Doe #20's university has advised her against doing so. She worries she will not be able to see her mother until her fellowship ends in 2020.

Soudeh Mirghasemi. Dr. Soudeh Mirghasemi is a United States citizen and resident of New York, where she is a professor of economics at Hofstra University. Her husband Dr. Bardiya Zangbar Sabegh is

a lawful permanent resident and surgeon at SUNY Downstate Medical Center in Brooklyn, New York. Both Dr. Mirghasemi and her husband are originally from Iran.

In August 2017, Dr. Mirghasemi gave birth to her first child. She and her husband made arrangements for her husband's parents to travel from Iran to New York in order to visit their first grandchild. Dr. Mirghasemi did not expect her husband's parents would have any problems obtaining visas, since they had received visas for travel to the United States on several prior occasions. Dr. Mirghasemi was therefore surprised when an official at the U.S. Embassy in Dubai rejected her mother-in-law's and father-in-law's applications without even reviewing the supporting documents they had brought with them to their interviews. Dr. Mirghasemi's mother-in-law was so shocked by the decision that she had an emotional breakdown at the Embassy and suffered from depression for months afterward.

Shortly after the interview, Dr. Mirghasemi's husband's parents received a letter from the U.S. consular office in Dubai, informing them their applications had been denied because they had failed to convince the consular officers they had "professional, work, school, family, or social links" to Iran that would "compel" them to return there after their visit to the United States—despite the fact that Dr. Mirghasemi's mother-in-law and father-in-law had lived their whole lives in Iran and had lawfully visited and returned to the United States several times before.

Mania Aghdasi. Mania Aghdasi is a naturalized United States citizen, married to another United States citizen with whom she has a son. Ms. Aghdasi resides in California but was born and raised in Iran,

where most of her family still lives. Her family in Iran suffered several tragedies in recent years: in 2007, her mother passed away and, in September 2016, her younger brother succumbed to brain cancer. Her widowed, 80-year-old father Zartosht was grief-stricken and Ms. Aghdasi sought to bring him to the United States from Iran to care for him.

In October 2016, Ms. Aghdasi's father interviewed for a visa at the U.S. Embassy in Yerevan, Armenia. As her father's application lingered in administrative processing for over a year, Ms. Aghdasi became desperate and her father's depression worsened. Ms. Aghdasi traveled to Iran to see her father in November 2017 and found him far weaker and more despondent than she had expected. She returned home to California. The following month, her father passed away.

Three weeks later, Ms. Aghdasi received the Embassy's decision. After waiting sixteen months, her father did not live long enough to learn his application had been denied and that he did not qualify for a waiver.

Dr. Reza Azimi. Reza Azimi is a naturalized U.S. citizen of Iranian birth. He resides in Michigan with his wife Colleen (also a U.S. citizen) and works in Detroit as a research scientist in the field of autonomous driving. He received his masters and doctoral degrees in electrical engineering from Carnegie Mellon University.

In April 2017, Dr. Azimi's parents learned that Colleen was expecting their first grandchild. Dr. Azimi's father had already applied for a tourist visa. Dr. Azimi's mother applied later in July 2017. Because Dr. Azimi's parents had visited the United States numerous times before, they did not anticipate any

difficulties with their visa applications. Dr. Azimi expected they would be present for the birth of their grandchild.

After several months without a decision from the U.S. Embassy, Dr. Azimi's wife gave birth. One week later, in January 2018, his mother received a letter informing her she had been found "ineligible for a visa under Section 212(f) of the Immigration and Nationality Act, pursuant to the Presidential Proclamation" and that she did not qualify for a waiver. The following month, Dr. Azimi's father received a similar letter, refusing his visa and denying a waiver.

Jane Doe #22. Jane Doe #22 is a U.S. citizen. Her brother is an Iranian citizen living in Iran. Their mother, who resides in Texas, was diagnosed with metastatic breast cancer, which she recently learned has spread to her lungs. Doctors have advised Jane Doe #22's mother that her condition is too fragile to risk travel outside the United States. Unable to see his sick mother in Iran, in August 2017 Jane Doe #22's brother applied for a visa, hoping to help Jane Doe #22 care for their mother in Texas.

In December, the Embassy informed him his application had been denied because of Presidential Proclamation 9645 and that he was ineligible for a waiver. He is now prevented from visiting his ailing mother and she from visiting him. Jane Doe #22's mother's oncologist has advised that having her son near would benefit her physically and emotionally, and her health has deteriorated since she learned of the Embassy's decision.

Jane Doe #16. Jane Doe #16 has lived in the United States for nearly 25 years. During that time, she became a U.S. citizen, established a wedding planning business, married, and now has several

daughters. Jane Doe #16's brother and sister also live and work in the United States. Jane Doe #16's sister is a U.S. citizen and her brother is a lawful permanent resident.

Three years ago, in 2015, after the death of her father, Jane Doe #16 began the process of obtaining a visa for her elderly mother, now living alone in Iran, so that her mother could be reunited with her family in the United States, and so that Jane Doe #16 could take care of her. After submitting all required documentation, in June 2016, Jane Doe #16's mother attended the visa interview in Ankara, Turkey. The consular officer told them that application was complete and that the remaining administrative process would take four months at most. Jane Doe #16 and her mother began to make plans for the move. Jane Doe #16's mother sold her house in Iran. But the months dragged on with no word from the Embassy until, finally, Jane and her mother were told that the visa was denied pursuant to the Proclamation.

Jane Doe #16, seriously concerned about the health of her mother (now suffering from depression), submitted an extensive visa waiver request. On January 30, 2018, Jane Doe #16 received an email from the U.S. Embassy acknowledging receipt of the documents but stating that no action was being taken on the application.

Hamed Rostamkhani. Hamed Rostamkhani and his wife are lawful permanent residents of the United States and citizens of Iran. They live in California with their two children who are four and six years old. Mr. Rostamkhani works at the University of California, Irvine, as a postdoctoral scholar in the Civil and Environmental Engineering Department. Mr. Rostamkhani assesses how to handle natural haz-

ards and their effects on coastal communities and infrastructure in the United States, such as wildfires and coastal flooding.

Mr. Rostamkhani's parents live in Iran. Because of his demanding work schedule, he does not have the time to visit Iran. Thus, the only way for Mr. Rostamkhani and his family to see his parents is for his parents to visit the United States. Mr. Rostamkhani's children are his parents' only grandchildren, and he believes it is very important for his children to have a relationship with their grandparents.

Mr. Rostamkhani's parents had a visa interview at the U.S. Consulate in Dubai in July 2016. The consular office told them they should receive their visas in about six weeks, but they never did. In December 2017, Mr. Rostamkhani learned from the consulate that his parents' visa had been denied because of the Proclamation. The consulate also said that his parents would not be granted a waiver, even though Mr. Rostamkhani and his parents were never advised of the opportunity to provide information regarding whether they were eligible for a waiver.

Jane Doe #17. Jane Doe #17 is a middle-school teacher in California. She came to the United States from Iran in 1996 with her father, mother, and brother, but her sister and niece still live in Iran. Jane Doe #17's sister and niece submitted applications for immigrant visas fourteen years ago, in the hopes of immigrating to the United States.

Jane Doe #17's niece fears for her safety in Iran. She is a 20-year-old student and has been involved in recent anti-regime protests in Iran, which has made her a government target. She is studying engineering and hopes to bring these skills to the United States.

Jane Doe #17's sister has waited for years to be able to join her family in the United States, but recently, this became a matter of great urgency. Her mother had brain surgery in the United States in early March, and Jane Doe #17's sister was not able to come for the surgery or help care for her mother during her recovery. While Jane Doe #17's sister hopes her mother will recover quickly, she is worried that she may never see her mother again.

After the Proclamation was enjoined, Jane Doe #17's sister finally received a request to schedule a visa interview. She promptly scheduled an interview for January 11, 2018, at the U.S. Embassy in Abu Dhabi. Her family worked with an immigration attorney to gather the materials necessary to show that her sister and niece were eligible for a waiver under Section 3(c) of the Proclamation. When Jane Doe #17's sister arrived at the interview, she gave the materials to the consular officer conducting the interview. But the official declined to accept it and told her that she wasted her money hiring an attorney to prepare the waiver request. The consular officer stated that until the Proclamation was lifted, she and her daughter could not receive visas. Jane Doe #17's sister subsequently received a notice stating that their visas had been "temporarily refused," citing Proclamation 9645.

Yahya Ghaleb. Yahya Ghaleb is a U.S. citizen with three children: two daughters who are U.S. citizens residing in the United States, and a 15-year-old son who lives in Yemen. His son, H., lived with the boy's mother until she passed away when he was four years old. H. now lives with his elderly grandmother, who struggles to take care of herself in her old age.

Since 2015, Yemen has been in a state of civil war. It is not safe for H. to remain in Yemen. The village where H. and his grandmother live was recently hit by a missile, and rebel troops frequently scour villages to force able-bodied men and boys join their forces.

Mr. Ghaleb decided that the only way to protect his son was to bring him to live in the United States. Mr. Ghaleb applied for a visa in June 2016 for H. to travel to the United States. Mr. Ghaleb scheduled H.'s visa interview at the U.S. Embassy in Djibouti and flew there from the United States to join H. for the interview. Meanwhile, H. made the difficult twenty-hour journey from Yemen to Djibouti. On December 11, 2017, while they waited in Djibouti, they learned that H.'s visa had been approved and that H. could travel with Mr. Ghaleb to his home in Dearborn, Michigan.

A little over a week later, they received another letter from the U.S. Embassy in Djibouti. According to the letter, a consular officer had decided that H. was now "ineligible for a visa under Section 212(f)" due to Presidential Proclamation 9645. The consular office also declined to grant H. a hardship waiver. The letter gave no further detail about either decision. Mr. Ghaleb and H. unsuccessfully tried to appeal the decision and assessed their options while remaining in Djibouti for several weeks. Following the rejection, H. to begin the twenty-hour journey back to Yemen.

Jane Doe #23. Jane Doe #23 is a U.S. citizen. Born in Iran, she moved to the United States in 2002 and received her doctorate in computer science. For the past eight years, she has worked as a software

engineer for a well-known global technology company.

In June 2016, Jane Doe #23 applied for a K-1 visa for her fiancé, a citizen of Iran. She anticipated the application would be approved in time for the couple's wedding, planned for the summer of 2017. In November 2016, Jane Doe #23 learned that USCIS had preliminarily approved her fiancé's visa application and scheduled an interview at the U.S. Embassy in Ankara, Turkey on February 8, 2017. But after Executive Order 13,769 went into effect in January 2017, the Embassy canceled the interview, only to inform the couple on February 7—the night before the scheduled interview—that the interview had been reinstated. The couple quickly arranged travel from Iran to the U.S. Embassy in Ankara and attended the interview.

Following the interview, the Embassy told Jane Doe #23 her fiancé's application had been placed in "administrative processing." Jane Doe #23 finally moved to France to be with her fiancé, after waiting for more than eight months for the Embassy's decision. The move required her to leave her friends and family in California as well as relocate from her office. The couple eventually abandoned their plans for a summer wedding in the United States and were married January 2018 in France—almost a year and a half after applying for the K-1 visa.

Jane Doe #18. Jane Doe #18 is a dual U.S.-Iranian citizen who was raised in Iran. Her husband also grew up in Iran and came to the United States to pursue a PhD in engineering. He is a lawful permanent resident of the United States.

Jane Doe #18 works as a financial advisor, and her husband works as an engineer for a well-known

global technology company. They have always envisioned that her parents would play a crucial role in providing childcare. In 2016, Jane Doe #18 applied for an immigrant visa for her parents, which was approved in the spring of 2017. But when they attended their visa interview in February 2018, the consular officer refused to grant them a visa, citing Presidential Proclamation 9645.

III. The Travel Ban Presents Grave Equal Protection and Due Process Concerns

As respondents have amply explained, Resp. Br. 30-76, the Proclamation exceeds the scope of the President's authority under the INA and violates the Establishment Clause by prohibiting 150 million citizens of largely Muslim-majority countries from entering the United States on the basis of their nationality. But the constitutional flaws in the President's latest Proclamation do not end there. The Proclamation also presents grave equal protection and due process concerns that the federal courts will be forced to confront if this Court vacates the decision below.[7]

1. The Proclamation excludes from the United States citizens of six Muslim-majority countries, as well as North Korea, and Venezuelan government officials, based on their national origin. The use of this suspect class is discriminatory not only in its own

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[7] The plaintiffs in this case (respondents here) raised due process and equal protection claims in their complaint, as did the plaintiffs in *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-361 (S.D. Md.), No. 17-2231 (4th Cir.), and the plaintiffs (*amici* here) in *Pars Equality Center v. Trump*, 16-cv-255 (D.D.C.). No court has yet reached the merits of the equal protection or due process challenges in ruling on plaintiffs' requests for preliminary injunction.

right, *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), but also because—notwithstanding the token imposition of restrictions on a tiny number of individuals from two other countries—it serves as a pretext for the President's well-documented desire to discriminate on the basis of religion, *see Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992).

This discrimination fails strict scrutiny. Its broadly stated rationale is to "address both terrorism-related and public-safety risks," but the Proclamation is not narrowly tailored to achieve these goals.[8] It bans nearly every person from seven of these countries and certain Venezuelan nationals without any evidence that any individual poses a threat to the United States, and without regard to whether individuals "have a credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (per curiam).

The Proclamation's provision for waivers does not change this analysis; to the contrary, it simply highlights the discrimination at the Proclamation's very core. Even in the abstract, the waiver program is a separate and inherently unequal system, predicated on discriminatory animus, that imposes burdens on nationals of the designated countries (and their U.S.

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[8] Even if a lesser form of scrutiny applied, government action that is "inexplicable by anything but animus toward the class it affects ... lacks a rational relationship to legitimate state interests." *Romer v. Evans*, 517 U.S. 620, 632 (1996). A classification premised on discriminatory animus can never be legitimate or bona fide because the government has no legitimate interest in exploiting "mere negative attitudes, or fear" toward a disfavored minority. *City of Cleburne*, 473 U.S. at 448.

sponsors) that are far more onerous than those shouldered by individuals of other nationalities. And in practice, as the stories above amply illustrate, the theoretical availability of case-by-case waivers has done nothing to temper the Proclamation's harshest effects by providing a means to identify individuals who pose no public-safety risk or who have bona fide relationships with the United States. In short, petitioners' implementation of the waiver system confirms the discriminatory animus that lies at the core of the Proclamation. And "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer v. Evans*, 517 U.S. 620, 634-35 (1996).

2. The Proclamation also violates the due process guarantees of the Fifth Amendment. A general ban on non-citizens' entry to the United States implicates the due process rights of U.S. citizens "who have an interest in specific non-citizens' ability to travel to the United States." *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017). In *Kerry v. Din*, 135 S. Ct. 2128 (2015), six Justices assumed or would have held that U.S. citizens have cognizable liberty interests in the entry of non-citizen spouses. *Id.* at 2139 (Kennedy, J., concurring in the judgment); *id.* at 2142 (Breyer, J., dissenting); *see also Kleindienst v. Mandel*, 408 U.S. 753, 764 (1972) (acknowledging a U.S. university's interest in the entry of a foreign visiting scholar). By imposing what is effectively a blanket ban on the entry of nationals of seven countries (plus Venezuelan officials), without affording the process that these individuals would have received under the visa system, the Proclamation summarily deprives U.S. citizens with whom those

foreign nationals have bona fide relationships of their constitutionally protected liberty interests.

Section 3(c)'s "waiver" provisions do not mitigate this grave due process concern. The Proclamation itself contains no guarantees of any modicum of process. *See supra* Part I. And the experiences of the countless individuals denied entry under the Proclamation—just a few of which are recounted here—having received no guidance about how to apply for a waiver, let alone an explanation of the reasons for the denial, *cf. Mandel*, 408 U.S. at 769; *Din*, 135 S. Ct. at 2140-41 (Kennedy, J., concurring in the judgment), confirm in the starkest terms that the prospect of case-by-case waivers is nothing but a mirage.

CONCLUSION

The decision below should be affirmed.

Respectfully Submitted,

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